

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CHRIS SHABAZZ-WIMBERLY,
Plaintiff,
v.
RUSS NICHOLS, Physical Plant
Manager at TRCI; CHARLES NAY,
Physical Plant Employee at
TRCI; A. SMITH, Physical
Plant Employee at TRCI; SUE
WASHBURN, Food Service
Manager at TRCI; GARY HALL,
(Former) Assistant Food
Service Manager at TRCI;
BRIAN MISNER, (Former) Food
Service Coordinator at TRCI;
BRIDGETT WHELAN, Health
Service Manager at TRCI;
CURTIS SYLE, (former)
Correctional Officer at TRCI;
and DAY, Corporal at TRCI,
Defendants.

2:14-CV-01237-BR

OPINION AND ORDER

CHRIS SHABAZZ-WIMBERLY
#10571327
Deer Ridge Correctional Institution
3920 East Ashwood Road
Madras, OR 97741

Plaintiff, *Pro Se*

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BROWN, Judge.

This matter comes before the Court on Defendants' Motion (#36) for Summary Judgment. For the reasons that follow, the Court **GRANTS in part** and **DENIES in part** Defendants' Motion.

BACKGROUND

On December 15, 2014, Plaintiff, an inmate at Deer Ridge Correctional Institution,¹ filed *pro se* an Amended Complaint in this Court pursuant to 42 U.S.C. § 1983 alleging Defendants violated his rights to be free from deliberate indifference under the Eighth Amendment, to due process under the Fourteenth Amendment, and to free speech in violation of the First Amendment.

On January 6, 2015, Defendants filed a Motion for Summary Judgment in which they seek to dismiss Plaintiff's claims for

¹ Plaintiff was an inmate at Two Rivers Correctional Institution from May 27, 2010, through October 31, 2014, at which time he was transferred to Deer Ridge Correctional Institution where he remains incarcerated.

failure to exhaust administrative remedies.

On January 7, 2015, the Court issued a Summary Judgment Advice Notice to Plaintiff advising him that if he did not submit admissible evidence in opposition to Defendants' Motion for Summary Judgment, summary judgment could be entered against him.

Plaintiff filed a Response to Defendants' Motion, and the Court took the matter under advisement on May 5, 2015.

STANDARDS

In the Ninth Circuit the failure to exhaust administrative remedies "should be treated as a matter in abatement, which is subject to an unenumerated Rule 12(b) motion rather than a motion for summary judgment." *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003). See also *Dixon v. Corr. Corp. of Am.*, 420 F. App'x 766, 767 (9th Cir. 2011)("[T]he failure to exhaust nonjudicial remedies that are not jurisdictional should be treated as a matter in abatement, which is subject to an unenumerated Federal Rule of Civil Procedure 12(b) motion rather than a motion for summary judgment."); *Puente v. City of Los Angeles*, 358 F. App'x 909, 910-11 (9th Cir. 2011) ("First, the district court did not abuse its discretion by declining to vacate its dismissal order based on Plaintiff's claim that Defendants' motion to dismiss was untimely. A motion to dismiss for failure to exhaust administrative remedies must be made as an

unenumerated Fed. R. Civ. P. 12(b) motion, and need not be filed before a responsive pleading."). The Court, therefore, treats Defendants' Motion as an unenumerated Rule 12(b) Motion to Dismiss.

To decide a motion to dismiss for failure to exhaust administrative remedies, the court may look beyond the pleadings and decide disputed issues of fact. *Id.* at 1119-20. Unlike summary judgment, dismissal for failure to exhaust administrative remedies is not a decision on the merits. *Id.* "If the district court concludes that the prisoner has not exhausted nonjudicial remedies, the proper remedy is dismissal of the claim without prejudice." *Id.* at 1120.

DISCUSSION

I. Prison Litigation Reform Act (PLRA) Exhaustion Requirement

The PLRA provides in pertinent part that "[n]o action shall be brought with respect to prison conditions under Section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Exhaustion is mandated regardless of the relief offered through the prison administrative procedures. *Booth v. Churner*, 532 U.S. 731, 740 (2001). See also *Brown v. Valoff*, 422 F.3d 926, 934-35 (9th Cir. 2005) (same).

The exhaustion requirement applies "to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter v. Nussle*, 534 U.S. 516, 532 (2002). See also *Valoff*, 422 F.3d at 935. In *Booth* the Supreme Court further held prisoners are obligated to navigate the prison's administrative review process "regardless of the fit between a prisoner's prayer for relief and the administrative remedies possible." 532 U.S. at 739-41. Accordingly, the Ninth Circuit has held "plaintiffs must pursue a remedy through a prison grievance process as long as *some* action can be ordered in response to the complaint." *Valoff*, 422 F.3d at 934 (emphasis in original). Even if the prisoner does not receive any more relief than "corrective action taken in response to an inmate's grievance [that] . . . improve[s] prison administration and satisf[ies] the inmate," it is sufficient relief for an inmate to continue with the administrative process. *Id.* at 936 (quoting *Porter*, 534 U.S. at 525).

Exhaustion of administrative remedies under 42 U.S.C. § 1997e(e) is an affirmative defense. *Valoff*, 422 F.3d at 936. "[D]efendants have the burden of raising and proving the absence of exhaustion." *Id.*

Relevant evidence in so demonstrating would include . . . regulations, and other official directives that explain the scope of the administrative review process; documentary or

testimonial evidence from prison officials who administer the review process; and information provided to the prisoner concerning the operation of the grievance procedure in this case.

Brown, 422 F.3d at 937. As noted, if the court concludes an inmate has failed to exhaust his administrative remedies, the proper remedy is dismissal without prejudice. *Stewart v. Korsen*, No. 11-15295, 2012 WL 767347, at *1 (9th Cir. Mar. 12, 2012).

II. The Grievance Process

Pursuant to the administrative rules of ODOC that govern inmate grievances, inmates at ODOC facilities are required to communicate with "line staff" verbally or in writing to resolve a dispute before filing a grievance. If communication with line staff does not resolve an inmate's issue, the inmate may then file a grievance form within 30 days of the incident or conflict. Inmates must attach copies of their previous communications with line staff to their grievance forms to demonstrate that they attempted to resolve the conflict informally before filing their grievance. If an inmate is not satisfied with the response to his or her grievance, the inmate may file an appeal to the functional unit manager by completing a grievance appeal form and filing it with the grievance coordinator within 14 days from the time the response was sent to the inmate. The grievance coordinator then assigns the grievance a number and records it in the grievance log.

An inmate may appeal the functional unit manager's decision

by submitting to the assistant director an appeal form, the original grievance, attachments, and staff responses. The grievance coordinator then date-stamps and logs the appeal. The decision of the assistant director is final and is not subject to further review.

ODOC informs inmates of the grievance procedure at their mandatory Admission and Orientation class held when inmates first arrive at a facility. In addition, information about the procedure is contained in the inmate handbook. Inmates may obtain grievance forms and instructions from any housing-unit officer.

III. Plaintiff's First Claim

In his First Claim Plaintiff alleges Defendants violated his right under the Eighth Amendment to be free from deliberate indifference when they (1) circumvented the safety switch on the tortilla machine that Plaintiff and other inmates operated, (2) failed to post any sign or to hold any training sessions with inmates advising them of the risk of operating the tortilla machine with the circumvented safety switch, and (3) refused to keep the doors ajar to the room containing the tortilla machine to allow gas fumes to dissipate.

The record reflects Plaintiff submitted two nonduplicative, grievances relevant to his First Claim.

Plaintiff submitted his first grievance (TRCI.2012.08.088)

related to his First Claim on August 21, 2012. Plaintiff stated he had presented a document to Food Service Manager Sue Washburn in which Captain Lytle stated one of the two doors in the tortilla room should remain ajar, but Washburn refused to permit inmates to keep one of the doors ajar. Plaintiff also noted his shirt caught fire on August 21, 2012, while he was working in the tortilla room. Decl. of Arnell Eynon, Ex. 4 at 5. On September 17, 2012, Defendant Gary Hall responded to Plaintiff's grievance .088 and stated the doors in the tortilla room were not propped open for security reasons, safety features such as sleeve protectors and heat-resistant gloves are available for inmates in the tortilla room, and ODOC staff members performed their duties in accordance with ODOC rules. Hall also advised Plaintiff that he was entitled to further review through the Grievance Review System. *Id.* at 5. Plaintiff filed a first appeal on September 21, 2012. On November 16, 2012, Superintendent Steve Franke responded to Plaintiff's appeal and advised Plaintiff that Franke concluded ODOC staff had performed their duties in accordance with ODOC rules, policies, and procedures. Eynon Decl., Ex. 4 at 2. Franke also advised Plaintiff that he was entitled to further review through the Grievance Review System. Plaintiff did not file a further appeal and, therefore, did not exhaust the grievance procedure with respect to grievance .088. Accordingly, the Court concludes Plaintiff has not exhausted his

administrative remedies with respect to that portion of his First Claim related to Defendants' failure to prop open one of the doors to the room containing the tortilla machine in order to vent gas fumes.

On August 21, 2012, Plaintiff submitted his second grievance (TRCI.2012.08.103) related to his First Claim. Plaintiff stated Defendants circumvented the safety switch on the tortilla machine and did not post signs or hold training sessions for inmates to operate the tortilla machine without a properly functioning safety switch. On November 5, 2012, Assistant Physical Plant Manager Jody Finck responded to Plaintiff's grievance .103 and advised Plaintiff that ODOC had purchased and installed a new switch on the tortilla machine, which was at that time operating within the manufacturer's specifications. Eynon Decl., Ex. 5 at 2. Finck acknowledged Plaintiff's additional request to post a sign, but she did not indicate any sign would be posted. Plaintiff did not appeal Finck's response. Plaintiff asserts in his Response to Defendants' Motion that he was not required to file any further appeal in order to exhaust his administrative remedies as to grievance .103 because he obtained the relief that he sought. See, e.g., *Ross v. City of Bernalillo*, 365 F.3d 1181, 1186-87 (10th Cir. 2004)(After "a prisoner has won all the relief that is available under the institution's administrative procedures, his administrative remedies are exhausted. Prisoners

are not required to file additional complaints or appeal favorable decisions in such cases. When there is no possibility of any further relief, the prisoner's duty to exhaust available administrative remedies is complete."). See also *Brady v. Attygala*, 196 F. Supp. 2d 1016, 1021 (C.D. Cal. 2002) ("It would be a strange rule that an inmate who has received all he expects or reasonably can expect must nevertheless continue to appeal, even when there is nothing to appeal.") (quotation omitted); *Gomez v. Winslow*, 177 F. Supp. 2d 977, 985 (N.D. Cal. 2001) ("Because [the plaintiff] had, in essence, 'won' his inmate appeal, it would be unreasonable to expect him to appeal that victory before he is allowed to file suit.").

Defendants assert Plaintiff did not receive all of the relief he sought in grievance .103 because even though Defendants installed a new switch on the tortilla machine, the response to Plaintiff's grievance did not state Defendants would not alter the safety switch on the new machine at some point in the future nor indicate they would put up a sign. The Court finds Defendants' argument unpersuasive.

In grievance .103 Plaintiff was concerned with the fact that Defendants circumvented the kill switch on the tortilla machine, and his request for a sign or for training was related only to the fact that the switch had been circumvented. By installing an entirely new and functional kill-switch, the need for a sign

and/or training was moot. Thus, Plaintiff essentially won the relief that he sought in grievance .103. The Court, therefore, concludes Plaintiff was not required to appeal or to take any further steps with respect to grievance .103. Accordingly, the Court concludes Plaintiff exhausted his administrative remedies with respect to that portion of his First Claim related to Defendants' circumvention of the kill-switch on the tortilla machine.

In summary, the Court concludes with respect to Plaintiff's First Claim for violation of the Eighth Amendment that Plaintiff has not exhausted his administrative remedies with respect to Defendants' failure to prop open one of the doors to the room containing the tortilla machine, but he has exhausted his administrative remedies with respect to Defendants' circumvention of the kill-switch on the tortilla machine.

Accordingly, the Court grants in part and denies in part Defendants' Motion to Dismiss Plaintiff's First Claim.

IV. Plaintiff's Second Claim

In his Second Claim Plaintiff alleges Defendants violated his right to due process under the Fourteenth Amendment when (1) on September 11, 2012, Defendant Hall provided false and misleading statements to Risk Management Inmate Injury Fund Claims regarding Plaintiff's August 21, 2012, injury and (2) on October 29, 2012, Defendant Bridgett Whelan made false

declarations to SAIF Corporation regarding Plaintiff's August 21, 2012, injury.

Plaintiff filed three relevant grievances to his Second Claim. In his grievance TRCI.2012.12.060 dated December 16, 2012, Plaintiff asserted on September 11, 2012, that Defendant Hall provided false and misleading statements to Risk Management Inmate Injury Fund Claims regarding Plaintiff's August 21, 2012, injury. On December 26, 2012, Plaintiff's grievance .060 was denied for Plaintiff's failure to comply with Oregon Administrative Rule 291-109-0150(2), which requires the grievance coordinator to receive a grievance "within [thirty] calendar days of the date of the incident giving rise to the grievance." Plaintiff asserts in his Response that his deadline to submit his grievance should not have begun to run until after Plaintiff discovered Hill's alleged false statements "on or about November 15, 2012." Plaintiff, however, did not file any response to or appeal of grievance .060 based on that assertion nor did he provide any other basis for challenging the denial. Plaintiff, therefore, did not exhaust the grievance procedure with respect to grievance .060. Accordingly, the Court concludes Plaintiff has not exhausted his administrative remedies with respect to that portion of his Second Claim based on Hill's alleged false statements to Risk Management.

In grievance numbers TRCI.2012.12.053 and TRCI.2012.12.102

dated December 16 and December 27, 2012, respectively, Plaintiff asserted Defendant Whelan made false declarations to SAIF Corporation on October 29, 2012, regarding Plaintiff's August 21, 2012, injury. On December 19, 2012, Plaintiff's grievance .053 was denied and on January 4, 2012, Plaintiff's grievance .102 was denied. Both grievances were denied based on Plaintiff's failure to comply with Oregon Administrative Rule 291-109-0150(2). Plaintiff asserts in his Response that his deadline to submit his grievance should not have begun to run until after Plaintiff discovered Whelan's alleged false statements "on or about November 15, 2012." Plaintiff, however, did not file any response to or appeal of grievances .053 and .102 based on that assertion nor did he provide any other basis for challenging the denial. Plaintiff, therefore, did not exhaust the grievance procedure with respect to grievances .053 and .102. The Court, therefore, concludes Plaintiff has not exhausted his administrative remedies as to his Second Claim.

Accordingly, the Court grants Defendants' Motion to Dismiss Plaintiff's Second Claim for failure to exhaust administrative remedies.

V. Plaintiff's Third Claim

In his Third Claim Plaintiff alleges Defendants violated his First Amendment rights when they retaliated against him for submitting various grievances by sending Plaintiff to segregation

"on trumped up charges" and by moving Plaintiff to a cell with a dangerous inmate.

On June 3, 2013, Plaintiff filed a discrimination complaint with ODOC asserting Defendants were discriminating against Plaintiff based either on his race or his religion because they denied Plaintiff's request for a cell move before Plaintiff had 90 days of conduct free of disciplinary actions (clear conduct). Plaintiff asserted he had witnessed "upwards of 20 in-unit cell changes for white and Hispanic inmates; many of which were requested and granted within 1 or 2 days." Eynon Decl., Ex. 10 at 2.

On August 20, 2013, Superintendent Taylor responded to Plaintiff that "ODOC acted in accordance with ODOC Rules" when they refused to move Plaintiff to another cell before Plaintiff had 90 days of clear conduct. Taylor also advised Plaintiff that he did not find Plaintiff was treated differently than other inmates. Finally, Taylor advised Plaintiff he was "entitled to further review by the Inmate Discrimination Complaint Review Committee" and informed Plaintiff how to obtain review by that Committee. Eynon Decl., Ex. 10 at 1.

Plaintiff did not request further review from the Inmate Discrimination Complaint Review Committee. Plaintiff, therefore, did not exhaust the administrative procedure with respect to his discrimination complaint. The Court, therefore, concludes

Plaintiff has not exhausted his administrative remedies as to his Third Claim.

Accordingly, the Court grants Defendants' Motion to Dismiss Plaintiff's Third Claim for failure to exhaust administrative remedies.

CONCLUSION

For these reasons, the Court **GRANTS in part** and **DENIES in part** Defendants' Unenumerated Rule 12(b) Motion (#36) to Dismiss. Accordingly, the Court **DISMISSES without prejudice** Plaintiff's Second and Third Claims as well as that portion of Plaintiff's First Claim regarding Defendants' failure to prop open one of the doors to the tortilla-machine room. This matter shall proceed only as to that portion of Plaintiff's First Claim related to Defendants' circumvention of the safety switch on the tortilla machine.

IT IS SO ORDERED.

DATED this 10th day of July, 2015.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge